Filed 2/1/10 In re Derick A. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re DERICK A., a Person Coming Under the Juvenile Court Law.	B211525 (Los Angeles County Super. Ct. No. TJ15198)
THE PEOPLE, Plaintiff and Respondent, v. DERICK A., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. John C. Lawson II, Commissioner. Affirmed.

Courtney Selan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

The Los Angeles County District Attorney alleged in a Welfare and Institutions Code section 602 petition that Derick A. (appellant) committed second degree robbery (Pen. Code, § 211)[1] and misdemeanor battery (§ 242). The petition further alleged that in the commission of the second degree robbery, a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The juvenile court sustained the petition and declared appellant a ward of the court. It placed appellant in a camp-community placement program for three months, and imposed a maximum confinement period of six years.

On appeal, appellant contends: (1) the evidence was insufficient to support the juvenile court's findings that appellant committed the robbery and battery; (2) he received ineffective assistance of counsel.[2] We affirm.

BACKGROUND

On July 24, 2008, Agustin Castillo was working as a cashier at Dominguez Market. At approximately 9:00 a.m., three individuals walked into the store. Castillo described them as black and 17 to 18 years old. They ordered some food and Castillo informed them that their food would not be ready until after 10:00 a.m. One of the individuals (the assailant) took a two-liter bottle of Fanta soda out of a case, placed it on top of the cashier counter, pulled a gun from his waistband, and pointed the gun at Castillo's head. The assailant was two feet from Castillo when this occurred.[3]

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 In his opening brief, which was filed before the Supreme Court's decision in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*), appellant also sought a ruling from this court declaring that the robbery adjudication would "not qualify as a 'strike' for future purposes because appellant did not have a jury trial." We deny the request. The Supreme Court held in *Nguyen* that the absence of a jury trial does not preclude a juvenile adjudication from qualifying as a "strike" for purposes of the "Three Strikes" Law. (*Id.* at p. 1028 ["We therefore hold . . . that the absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person"].)

3 Castillo testified that he had never seen the assailant before.

The assailant instructed Castillo to open the register. Castillo complied and the assailant reached over the counter and took approximately $350 from the register. The assailant next instructed Castillo to open two other registers that were located in another part of the market. Castillo complied and the assailant took approximately $500 from those registers. The assailant then instructed Castillo to open the market's safe. Castillo said that he could not open the safe, which prompted the assailant to hit Castillo. The assailant left the store with the other two individuals. The two-liter Fanta soda bottle remained on the counter where the assailant had first placed it.

At trial, Castillo testified that he did not recognize appellant as being involved in the charged crimes. On cross-examination, Castillo testified that people sometimes come into the market, look around, and leave without buying anything.

Joseph Lee, a forensic specialist with the Long Beach Police Department, testified that shortly after the incident occurred, he went to Dominguez Market to dust for fingerprints. Lee dusted the two-liter soda bottle that the assailant had left on the counter, the market's front door, the counter, the register at the counter, and the two registers at the other part of the market. Lee was able to lift five prints from the soda bottle and three prints from the front door.[4] Lee was unable to lift fingerprints from the other surfaces that he dusted.

Sarah Barnard, a forensic specialist with the Long Beach Police Department, examined the eight prints lifted by Lee to determine whether any of them were of sufficient quality to be entered into the Automated Fingerprint Identification System (AFIS)[5]. Barnard concluded that two of the prints lifted from the soda bottle (Peo. Exhs. 1 & 3) and one of the prints lifted from the front door (Peo. Exh. 8) were of sufficient quality to enter in AFIS. Barnard plotted unique ridge characteristics on each

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[4] At trial, the five prints lifted from the soda bottle were marked as People's Exhibits 1 through 5. The three prints from the front door were marked as People's Exhibits 6 through 8.

[5] AFIS is a searchable database of fingerprints and palm prints of people who have been arrested in Los Angeles County.

of these three prints and ran the prints through AFIS. For each of the three prints, AFIS generated a list of 50 individuals who shared similar ridge characteristics plotted by Barnard, with the most likely match at the top of the list. Appellant appeared on the AFIS list of possible matches.

For People's Exhibit 3 (a palm print lifted from the soda bottle), appellant appeared as the first person on the AFIS list. Based on this ranking, Barnard retrieved a full set of appellant's prints from the Department of Justice (DOJ) database and compared those prints to People's Exhibit 3. She concluded that the prints matched. Barnard then asked two of her colleagues to compare appellant's prints with the lifted print. Both colleagues agreed with Barnard's conclusion that the prints matched. Because People's Exhibit 3 matched appellant's prints, Barnard did not compare the prints of the remaining individuals on the AFIS list (2 through 50) to determine whether their prints could have matched the lifted print.

For People's Exhibit 1 (also a partial palm lifted from the soda bottle), appellant appeared as the fourth person on the AFIS list. Barnard compared the palm prints of the three individuals who ranked higher than appellant to People's Exhibit 1 and concluded that none of these individuals matched the lifted print. When Barnard compared appellant's palm print to People's Exhibit 1, however, she concluded that the prints were a match.

For People's Exhibit 8 (a right index fingerprint from the front door), appellant appeared on the AFIS list, but Barnard did not have the proper documentation at trial to state where on the list appellant appeared. Nonetheless, she testified that People's Exhibit 8 matched appellant's right index fingerprint.

Although People's Exhibit 2 (another lift from the soda bottle) was not of sufficient quality to run through AFIS, Barnard concluded from a visual comparison that People's Exhibit 2 matched appellant's left index finger. In the course of her examination and comparison of all the lifted prints, she did not identify any other possible suspects.

Appellant did not testify. The defense called Long Beach Police Department Detective Gary Lawson. Detective Lawson testified that he, along with his partner Detective Gomez, had presented Castillo with a six-pack photographic display (six-pack) sometime after the incident had occurred. Before Detective Lawson could testify about whether Castillo identified someone in the six-pack, the prosecution objected on hearsay grounds. The juvenile court sustained the objection and there was no further testimony on this topic.[6]

DISCUSSION

I. Sufficiency of Evidence

Appellant contends that the evidence presented by the prosecution was insufficient to support the juvenile court's findings that he committed the alleged offenses.

"Our Supreme Court has set forth the applicable constitutional test concerning the sufficiency of evidence in cases where the conviction is premised on fingerprint evidence as follows: 'An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a

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[6] Appellant does not challenge the juvenile court's ruling on the hearsay objection on appeal.

reasonable doubt." [Citation.]' (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.)" (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587 (*Figueroa*).)

"The California Supreme Court has repeatedly emphasized that fingerprints are the strongest evidence of identity and ordinarily are sufficient by themselves to identify the perpetrator of the crime." (*Figueroa, supra,* 2 Cal.App.4th at p. 1588 citing *People v. Johnson* (1988) 47 Cal.3d 576, 601 and *People v. Gardner* (1969) 71 Cal.2d 843, 849 (*Gardner*) ["Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant. [Citations.] The jury is entitled to draw its own inferences as to how the defendant's prints came to be on the bag and when [citation] and to weigh the evidence and opinion of the fingerprint experts"].)

Although appellant claims it is possible that he could have placed his fingerprints on the soda bottle sometime before the assailant touched the bottle, it was up to the juvenile court as the fact finder to determine how and when appellant's prints were placed on the bottle. (*Gardner, supra,* 71 Cal.2d at p. 849.) The juvenile court determined that appellant placed the prints on the soda bottle shortly before he demanded money from Castillo at gunpoint. We are satisfied that this was a reasonable inference to be drawn from the evidence.

The cases cited by appellant do not compel a different conclusion. In *People v. Jenkins* (1979) 91 Cal.App.3d 579 (*Jenkins*), the defendant was convicted of manufacturing PCP and possessing piperidine and cyclohexanone with the intent to manufacture PCP. The only evidence linking the defendant to these charged crimes was the presence of his fingerprints on three containers found inside a garage used for the manufacturing of PCP. The garage belonged to the defendant's brother and none of the containers with the defendant's prints contained PCP, piperidine, or cyclohexanone. (*Id.* at p. 582.) Under these facts, the Court of Appeal reasoned that "[t]he only fact directly inferable from the presence of the fingerprints is that sometime, somewhere defendant touched the containers." (*Id.* at p. 584.)

In *Birt v. Superior Court* (1973) 34 Cal.App.3d 934 (*Birt*), the victim came home and saw two men loading some of the victim's possessions into a rental van. When the

victim confronted them, the men fled. Authorities found a cigarette lighter in the front seat. The defendant's print was on the lighter, but nowhere else in the van or on the stolen items. The defendant was charged with burglary. The Court of Appeal reversed the trial court's denial of the defendant's motion to set aside the information. It reasoned that the van itself had been available to the public and that "[o]nly by guesswork, speculation, or conjecture can it be inferred that petitioner was inside the van, or in the area, at the time of the . . . burglary." (*Id*. at p. 938.)

Here, the juvenile court could infer from the evidence that appellant was the person who touched the soda bottle just before demanding money from Castillo at gunpoint. Had the authorities dusted Dominquez Market and simply found appellant's prints on a soda bottle with no connection to the assailant whatsoever, then we agree that the reasoning in *Jenkins* and *Birt* would apply. Castillo saw the assailant handle the soda bottle shortly before he robbed Castillo and appellant's prints were found on that same bottle shortly after the incident occurred. As the *Jenkins* court acknowledged, "the choice among the several permissible inferences from circumstantial evidence was for the trier of fact, not us." (*Jenkins, supra*, 91 Cal.App.3d at p. 584.)[7]

Appellant also relies on *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 (*Mikes*). In that case, the Ninth Circuit Court of Appeals held that when a criminal case is premised solely upon the defendant's fingerprints left on the murder weapon at a homicide scene, "the prosecution must present evidence sufficient to permit the jury to conclude that the

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[7] *People v. Johnson* (1984) 158 Cal.App.3d 850, another PCP possession case, cited by appellant is likewise inapposite. In that case, officers found a glass bottle containing one ounce of PCP inside a small hole that had been drilled into the ceiling of a residence. The glass bottle had multiple prints on it, including the defendant's print. There was no evidence that the defendant owned the residence or had control over it in any fashion. Relying on *Jenkins, supra*, 91 Cal.App.3d 579, the Court of Appeal in *Johnson* held that the conviction for possession of PCP could not stand because the glass bottle itself was not contraband and there was insufficient evidence that the defendant actually or constructively possessed the PCP inside the bottle. (*Johnson, supra*, at pp. 854–855.) *Johnson* is distinguishable from this case for the same reasons that *Jenkins* and *Birt* are distinguishable.

objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime." (*Id*. at p. 357.) The year after *Mikes* was issued, the Court of Appeal in *Figueroa*, *supra*, 2 Cal.App.4th 1584 declined to follow the holding in *Mikes*, reasoning that *Mikes* appeared in conflict with a California Supreme Court precedent, and thus "may not be relied upon by California intermediate appellate and trial courts because it is an intermediate federal appellate court decision." (*Figueroa, supra,* at p. 1588.)

In sum, there was sufficient evidence from which the juvenile court could conclude that it was appellant who committed the robbery and battery against Castillo.

II. Ineffective Assistance of Counsel

During its case-in-chief, the defense called Detective Lawson, the officer who prepared the police report on the matter, to testify. Detective Lawson testified that on September 10, 2009, he and his partner, Detective Gomez, met with Castillo. Detective Gomez presented Castillo with a six-pack and interviewed Castillo in Spanish. Detective Lawson testified that he did not understand what was being said in the interview because he did not speak Spanish. Defense counsel then asked whether Castillo had made any marks on the six-pack. The prosecution objected on hearsay grounds and the trial court sustained the objection. Defense counsel did not ask Detective Lawson any further questions.

On appeal, appellant contends his trial counsel was ineffective by: (1) failing to question Castillo about whether he identified someone other than appellant when presented with the photographic display; and (2) failing to call Detective Gomez to testify at trial.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. (E.g., *People v. Staten* (2000) 24 Cal.4th 434, 450–451; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217).) When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no

satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, "'"'"but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"' (*Staten, supra,* at p. 451, quoting *Ledesma, supra,* 43 Cal.3d 171, 217–218; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687–688.)" (*People v. Anderson, supra,* 25 Cal.4th at p. 569.)

In our view, the appellate record affords no basis for concluding that trial counsel was ineffective in failing to ask Castillo about the six-pack or calling Detective Gomez instead of Detective Lawson. Castillo testified on direct examination that he did not recognize appellant as being involved in the charged crimes. This was favorable evidence for the defense and a compelling basis on which to argue that appellant was innocent. Defense counsel could have made the tactical decision not to ask Castillo or Detective Gomez about the six-pack because such a line of questioning might have been unfavorable for the defense. For instance, Castillo might have identified appellant's photograph as the assailant or he might have identified a third party but with some uncertainty or equivocation.[8] Defense counsel may have very well believed that it was to appellant's best advantage to rely solely on Castillo's inability to identify appellant at trial. In short, there are satisfactory explanations for defense counsel's failure to ask Castillo or Detective Gomez about the six-pack and we simply cannot tell from the record

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[8] There is nothing in the appellate record to support appellant's contention that Castillo "positively identified another individual, not appellant, as the perpetrator." Detective Lawson testified that he and his partner presented Castillo with a six-pack photographic display. Before he could testify about whether Castillo identified a particular photograph in that display, the prosecution objected. No other evidence as offered on this point. Even if we were to assume that Castillo identified a third party, as appellant claims that Castillo did, there is no evidence in the appellate record as to how certain Castillo was in his identification.

the reasons defense counsel chose to do what she did. Under these circumstances, we must affirm. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254 [“‘“Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance’”’”].)

In sum, because the appellate record does not show the reason for defense counsel’s challenged actions, and there are satisfactory explanations for her actions, we must affirm the conviction. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ